89-218

No.

Supreme Court, U.S.
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CLERK

IN THE

Supreme Court Of The United States

OCTOBER TERM, 1989

ANDREW GORDON LEONARD,

Petitioner,

v.

TOWN OF HERNDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

Stewart C. Economou, Esquire,
Counsel for Petitioner
J. Casey Forrester, Esquire,
Co-Counsel for Petitioner
ECONOMOU
AND FORRESTER
122 South Royal Street
Post Office Box 19467
Alexandria, Virginia 22320-0467
Telephone: 703/549-7510

August 7, 1989

Balmar Legal Publishing Division, Washington, D.C. 20005 (202) 659-3610

QUESTIONS PRESENTED FOR REVIEW

1. Does a person charged under State law with driving while intoxicated and refusing to submit to a blood or breath test have standing to challenge the facial constitutionality of the refusal statute under which he was convicted?

2. Is the Virginia statute on refusal to submit to a blood or breath test, §18.2-268(n) of the Code of Virginia, unconstitutional because it imposes an impermissible burden on a defendant's constitutional right not to plead guilty as guaranteed by the Fifth Amendment to the United States Constitution, and as made applicable to the States through the Fourteenth Amendment to the Constitution?

Parties Below: The Commonwealth of Virginia filed an *amicus curiae* brief in the Virginia Supreme Court supporting the Town of Herndon, but otherwise, the caption contains the names of all parties below. 28 U.S.C. §2403(b) may be applicable, so a copy of this Petition is being served on the Attorney General of Virginia.

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ANDREW GORDON LEONARD,

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TOWN OF HERNDON,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF VIRGINIA

The petitioner, Andrew Gordon Leonard, respectfully prays that a writ of certiorari issue to review the final judgment of the Supreme Court of Virginia, dated June 9, 1989, holding that the petitioner lacks standing to attack the facial constitutionality of the refusal statute, Virginia Code §18.2-268(n), under which he was charged and convicted.

OPINIONS BELOW

The opinion of the Supreme Court of Virginia is unpublished, but appears in the Appendix hereto. The opinions of the Court of Appeals of Virginia and of the Fairfax County Circuit Court are also unpublished but are also reprinted in the Appendix.

JURISDICTION

The judgment of the Supreme Court of Virginia was entered on June 9, 1989. This Petition for Certiorari is being filed within sixty days of the entry of final judgment below. This Court's jurisdiction is invoked under 28 U.S.C. §1257.

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

United States Constitution, Fifth Amendment

Code of Virginia, §18.2-268

Ordinances of the Town of Herndon, §13.3

(See Appendix.)

STATEMENT OF THE CASE

On September 19, 1986, the defendant, Andrew G. Leonard, was arrested in the Town of Herndon, Virginia and charged with driving while intoxicated and refusal to submit to a blood or breath test, both charges being in violation of §13.3 of the Ordinances of the Town of Herndon, which specifically adopts and incorporates §18.2-266 *et seq.* of the Virginia Code. (See Joint Appendix pp. 1-2.) On January 16, 1987, the defendant appeared for trial in the General District Court of Fairfax County. Before entering pleas of not guilty on both charges, the defendant preliminarily challenged the constitutionality of §18.2-268(n) [currently designated as subsection T] of the Code of Virginia on the ground that disparate treatment of those who plead guilty as opposed to those who plead not guilty exacts a price and imposes a burden on the defendant's right to go to trial. (See J.A. pp. 5-7.) The defendant argued that such a penalty was unconstitutional and cited as authority the United States Supreme Court case invalidating the death penalty provision of the Federal Kidnaping Act, more commonly called the Lindbergh statute. [See, *United States v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968)].

In the interest of judicial economy and efficiency, Judge Stewart P. Davis decided to hear all of the evidence on the merits that day, subject to his ruling on the defendant's timely attack on the constitutionality of the statute and with the understanding that the defendant's objection to the proceeding on constitutional grounds was being preserved. Both the Town and the defendant agreed to go forward on that basis and Judge Davis received the testimony of witnesses for both sides. Judge Davis found the defendant not guilty of the charge of driving while intoxicated but

made a finding of guilt as to the refusal charge, subject to his ruling on the preliminary constitutional attack which he took under advisement. (See J.A. p. 3.)

On July 17, 1987, Judge Davis orally announced his decision from the bench denying the defendant's motion to dismiss the refusal charge. The defendant perfected his appeal under Virginia's two-tier court system to the Fairfax County Circuit Court on July 24, 1987.

On September 16, 1987, the defendant filed a motion to dismiss the refusal charge in the Fairfax County Circuit Court on the same constitutional grounds. (See J.A. p. 16.) The case came on for a *de novo* trial on the refusal charge on September 17, 1987. Judge Johanna L. Fitzpatrick decided to hear the evidence on the refusal charge at that time while taking under advisement the defendant's motion to dismiss. On November 4, 1987, Judge Fitzpatrick issued a letter opinion denying the defendant's motion to dismiss and finding the defendant guilty on the refusal charge. Judge Fitzpatrick found that the case of *United States v. Jackson* was not controlling because *Jackson* had been subsequently limited by this Court in several decisions culminating in *Corbitt v. New Jersey*, 439 U.S. 212, 99 S.Ct. 492, 58 L.Ed.2d 466 (1978). Judge Fitzpatrick held that the statute did not "needlessly" encourage guilty pleas. (See J.A. pp. 18-19.) On November 12, 1987, the Circuit Court entered the conviction order revoking the defendant's privilege to drive for six months. (See J.A. p. 20.)

On November 16, 1987, the defendant filed his Notice of Appeal to the Court of Appeals of Virginia. The Fairfax County Circuit Court entered an Order on November 20, 1987 suspending the judgment pending the outcome of this appeal.

On September 29, 1988, the Court of Appeals of Virginia denied the Petition for Appeal on the ground that Virginia Code §18.2-268(n) does not violate a defendant's constitutional right not to plead guilty. (See J.A. p. 21.) The Court of Appeals cited *Corbitt v. New Jersey* in support of its opinion and distinguished the case of *United States v. Jackson* on the ground that the Virginia refusal statute only gave discretion to the trial court to dismiss the charge.

On October 21, 1988, the defendant filed his Notice of Appeal to the Supreme Court of Virginia pursuant to Virginia Code §17-116.07(B) since the decision of the Court of Appeals involved a substantial constitutional question as the determinative issue. On January 5, 1989, the Supreme Court of Virginia granted a writ to review the order entered by the Court of Appeals. The Commonwealth of Virginia then filed a brief *amicus curiae* raising the question of the defendant's standing to make this constitutional challenge even though each Court below had considered the merits of the constitutional argument. On June 9, 1989, the Supreme Court of Virginia ruled that the defendant lacked standing to attack the facial constitutionality of the refusal statute, and the Court affirmed the action of the Court of Appeals of Virginia in denying the Petition for Appeal, even though the Court of Appeals denied the Petition on the merits and not on the ground that the defendant lacked standing.

REASONS FOR GRANTING THE WRIT

The question of standing raised by this case is an important one which should be addressed by this Court because the Supreme Court of Virginia used standing to preclude the defendant from challenging the federal constitutionality of a statute under which he was charged and convicted. The constitutional issue is important because this Court has not had occasion to rule on the constitutionality of a civil statute encouraging defendants to plead guilty to a separate criminal statute. Also, this Court has not clearly drawn the line between the unconstitutionality of the statute in *U.S. v. Jackson*, 390 U.S. 570, 88 S.Ct. 1209, 20 L.Ed.2d 138 (1968), and the constitutionality of the statute in *Corbitt v. New Jersey*, 439 U.S. 212, 995 S.Ct. 492, 58 L.Ed.2d 466 (1978). Finally, three lower courts from other jurisdictions have split on *Jackson* challenges to refusal statutes.

This Court has made it clear that standing to assert federal rights is a question of federal law: "Whether a pleading sets up a sufficient right of action or defense, grounded on the Constitution or a law of the United States, is necessarily a question of federal law and, where a case coming from a state court presents that

question, this Court must determine for itself the sufficiency of the allegations displaying the right or defense, and is not concluded by the view taken of them by the state court". *Staub v. City of Baxley*, 355 U.S. 313, 318, 78 S.Ct. 277, 2 L.Ed.2d 302 (1958); *Allied Stores of Ohio, Inc. v. Bowers*, 358 U.S. 522, 525, 79 S.Ct. 437, 440, 3 L.Ed.2d 480 (1959); see also, *Cramp v. Board of Public Instruction*, 368 U.S. 278, 82 S.Ct. 275, 7 L.Ed.2d 285 (1961). Mr. Justice Holmes also said that state courts cannot deny the assertion of federal rights: "Whatever springes the State may set for those who are endeavoring to assert rights that the State confers, the assertion of Federal rights, when plainly and reasonably made, is not to be defeated under the name of local practice". *Staub v. City of Baxley*, 355 U.S. at 318-319, quoting *Davis v. Wechsler*, 263 U.S. 22, 24, 44 S.Ct. 13, 14, 68 L.Ed. 143 (1923).

The defendant has standing because he has suffered a direct injury as a result of the refusal statute's provision allowing the trial court to dismiss the underlying charge of DWI if the defendant pleads guilty to the refusal charge. The requirement of standing is so that the litigant has a direct interest in the controversy and will adequately present the issues. See, *Baker v. Carr*, 369 U.S. 186, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962); see also, *Flast v. Cohen*, 392 U.S. 83, 88 S.Ct. 1942, 20 L.Ed.2d 947 (1968). Obviously, someone charged with violating a refusal statute has a direct interest in the application of that statute, especially when the refusal statute encourages the defendant to plead guilty to a separate criminal charge. This appeal clearly presents a case or controversy, and no legitimate state interest is served by denying Leonard standing to attack the statute under which he was convicted and his driving privileges were suspended for six months.

There are three cases from other jurisdictions involving *Jackson* challenges to refusal statutes, and none of them suggests that standing has been a significant issue in this area. In two of the cases, *Voyles v. Thorneycroft*, 398 F.Supp. 706 (D.Ariz. 1975), and *Haas v. State, Bureau of Motor Vehicles*, 7 Ohio App.3d 139, 545 N.E.2d 974 (1982), each Court expressly held that the defendant had standing, although the procedural history of the case was not given. In the third case, *Veilleux v. Springer*, 300 A.2d 620 (Vt. 1973), the defendant pled not guilty to the DWI charge yet the

Court did not discuss the issue of standing. Furthermore, while the petition was pending, the DWI charge was *nolle prossed* and the defendant pled guilty to a lesser charge, yet the Court did not raise the issue of mootness.

Even the leading cases from this Court on one's constitutional right not to plead guilty fail to support an argument that the defendant in this case lacks standing. In the *Jackson* case, the defendant filed a motion to dismiss the kidnapping charge which was granted by the trial court. In *Corbitt v. New Jersey*, the defendant went to trial on the murder charge yet still asserted that the sentencing scheme needlessly encouraged him to plead guilty. The majority opinion does not mention the issue of standing, but Mr. Justice Stewart, in his concurring opinion, notes the incongruity of the defendant's position in asserting after his trial that the statute encouraged him to plead guilty, and contrasts this position with *Jackson* where the defendant "brought a facial attack on the constitutionality of the statute by way of a motion to dismiss the indictment". 439 U.S. at 227.

In this case, the defendant has brought a facial attack on the constitutionality of Virginia Code §18.2-268(n) by way of a motion to dismiss. This motion was made orally in the General District Court prior to a plea being entered, and a written motion to dismiss was filed in the Fairfax County Circuit Court prior to trial. (See, J.A. pp.5-16.) It is true that the defendant faced only the refusal charge in the Circuit Court as he was acquitted on the DWI charge in the General District Court. In the Circuit Court then, the defendant's right to go to trial was no longer chilled by §18.2-268(n) since the defendant did not face the dilemma of whether to plead guilty to the underlying DWI charge. Nevertheless, the defendant was and is still affected by the unconstitutional provision of the refusal statute in the sense that the Circuit Court did not have the statutory authority to dismiss the refusal charge on its own even though the Circuit Court would have had such power if the defendant had pled guilty to the DWI charge in the General District Court. The defendant is still subjected to harsh consequences which he might not have had to face if he had pled guilty to the DWI charge.

The procedure on appeal of a refusal charge is such that the Circuit Court must consider the procedural posture of the case in the General District Court, unlike a *de novo* trial for a misdemeanor. If a defendant pleads guilty to the DWI charge in the General District Court and then appeals only his refusal conviction, the defendant can still argue in the Circuit Court for a dismissal of the refusal charge pursuant to §18.2-268(n). Although §18.2-268(p) [currently designated as subsection V] provides that the procedure for appeal of a refusal charge shall be the same as for misdemeanors, the Virginia Supreme Court has made it clear that the procedures are not the same in all respects. In *City of Virginia Beach v. Reneau*, 217 Va. 867, 234 S.E.2d 241 (1977), and *City of Norfolk v. Brown*, 218 Va. 924, 243 S.E.2d 200 (1978), the Court held that the City was entitled to appeal a dismissal of the refusal charge because the refusal proceeding is civil and not criminal in nature. In *City of Virginia Beach v. Reneau*, the General District Court convicted the defendant on the refusal charge after amending the DWI charge to reckless driving and convicting the defendant of improper driving. The Circuit Court dismissed the refusal charge because the General District Court had tried the defendant on the refusal charge after amending the DWI charge to reckless driving, and §18.2-268(l) [currently designated as subsection R] requires the refusal charge to be heard subsequent to the trial of the DWI charge. The Virginia Supreme Court held that there had been a trial in the General District Court on the DWI charge prior to the refusal charge in accordance with the statute, regardless of the outcome of the DWI trial. *Reneau* implicitly recognizes that the Circuit Court may decide a refusal case on the basis of error in the General District Court rather than strictly on a *de novo* basis as a criminal misdemeanor. In this case, the constitutional issue should be decided based on the procedural posture of the case when the issue was first raised in the General District Court.

Virginia's implied consent statute, Virginia Code §18.2-268, provides that a person may be charged for his refusal to take a blood or breath test upon an arrest for driving while intoxicated pursuant to §18.2-266 or a similar ordinance. The statue, §18.2-268(n), further provides that "if the defendant shall plead guilty to

a violation of §18.2-266, or of a similar ordinance of a county, city or a town, the Court may dismiss the warrant". This statute violates a defendant's constitutional right not to plead guilty under the Fifth Amendment to the United States Constitution, as made applicable to the states through the Fourteenth Amendment. See, *United States v. Jackson*.

The refusal provisions of Virginia's implied consent statute impose an impermissible burden on a defendant's constitutional right not to plead guilty in that the statute needlessly encourages guilty pleas. The general purpose of the statutory provision may be legitimate but the general purpose cannot save the statute if it unnecessarily chills one's constitutional rights. Since a defendant who refuses to take a blood or breath test deprives the Commonwealth of key evidence in the underlying DWI prosecution, the legislature decided in §18.2-268 to punish the defendant separately for a refusal. If the defendant pleads guilty to the underlying DWI, then the refusal is of no consequence since the Commonwealth is not prejudiced by the absence of the blood or breath test. The constitutional infirmity with §18.2-268(n) is that the provision only applies to guilty pleas even though the same rationale would apply to pleas of *nolo contendere* and convictions upon pleas of not guilty. The same goals could be accomplished if the statute provided that upon any conviction of the underlying DWI, regardless of the plea, the court may dismiss the refusal charge. A better alternative is for the court not to have the power to dismiss on its own the refusal charge. If the Commonwealth wanted to dismiss a refusal charge in a certain case, it could do so in the same manner that all other criminal charges are dismissed by the Commonwealth, namely upon motion of the prosecutor for *nolle prosequi* with the court's consent. See, Virginia Code §19.2-265.3. There is no statute in Virginia other than §18.2-268(n) which gives the court the power to dismiss a warrant on its own motion without cause. There is no need for the court to have this power of dismissal given by §18.2-268(n), so the statute's effect of encouraging guilty pleas is unnecessary and, therefore, excessive.

One distinctive feature of our case is that the statute in question [§18.2-268(n)] impinges on a defendant's right to trial under a different statute (§18.2-266). See also, *Scharf v. United*

States, 606 F.Supp. 379 (E.D. Va. 1985) (applying *Jackson* to the Victims of Crime Act of 1984). The typical situation, as exemplified by *Jackson*, is where a statute offers a benefit in return for a guilty plea under that same statute. In our case, the refusal statute offers a benefit to the defendant in return for a guilty plea to a DWI charge. What is even more unusual is that a refusal proceeding is a civil and administrative proceeding for which a defendant does not have all of the constitutional rights of a criminal defendant, such as the right to counsel. See, *Deaner v. Commonwealth*, 210 Va. 285, 170 S.E.2d 199 (1969). The refusal statute, which sets out a civil and administrative proceeding without certain constitutional safeguards, needlessly encourages a defendant to waive his constitutional rights and to plead guilty to the criminal charge of DWI. The Virginia Supreme Court has said on more than one occasion that a DWI trial and a refusal trial are independent proceedings and "the outcome of one is of no consequence to the other". *Deaner v. Commonwealth*, 170 S.E.2d at 201; *City of Virginia Beach v. Reneau*, 234 S.E.2d at 242. If the two proceedings are supposed to be independent, then the statute should not encourage a defendant to plead guilty to the criminal charge in order to obtain a dismissal of the civil charge.

The current statutory scheme in Virginia is broader than necessary for the Commonwealth to reach its legitimate goal of compensating for the lack of a blood or breath test in refusal cases. For example, a defendant might be willing to stipulate to his intoxication but still want to go to trial to challenge the arresting officer's probable cause for the initial stop or to argue that the defendant was not operating the vehicle. By not pleading guilty to the DWI charge, this defendant could not ask the court to dismiss his refusal charge even though he did not challenge the Commonwealth's evidence of intoxication. §18.2-268(n) does not admit any exceptions as the court's power to dismiss the refusal charge turns solely on the nature of the plea to the DWI charge, which is why the legitimate encouragement of guilty pleas should be left in the hands of prosecutors who can negotiate on an individual basis.

In *Jackson*, this Court struck down the portion of the Federal Kidnapping Act which provided for the death penalty "if the

verdict of the jury shall so recommend". See *Jackson*, 390 U.S. at 571. The result of this provision was that a defendant who pleaded guilty or waived a jury trial could avoid altogether the risk of the death penalty, while those who stood upon their constitutional rights and elected a jury trial faced the possibility of death. In *Corbitt v. New Jersey*, this Court rejected a challenge based on *Jackson* to a New Jersey sentencing scheme for murder. The New Jersey statute provided that a defendant convicted by a jury of first degree murder received a mandatory sentence of life imprisonment, while a defendant convicted of second degree murder received a term of thirty years or less. Defendants could not plead guilty and could not have a trial without a jury. A defendant, however, could plead *non vult*, which is legally equivalent to *nolo contendere*, to the general indictment and be punished by the court to either life imprisonment or a term of thirty years or less without the court determining which degree of murder was committed. This Court distinguished *Jackson* on the basis that the pressure to plead guilty was greater in *Jackson*. This Court noted that *Jackson* did not forbid any encouragement of guilty pleas but only *needless* encouragement of guilty pleas, as numerous decisions have upheld the constitutionality of plea bargaining. *Corbitt v. New Jersey*, 439 U.S. at 219, n. 9.

Although this Court in *Corbitt* did not limit *Jackson* just to capital cases, the broad language of the *Corbitt* opinion does limit the reach of *Jackson*. On the other hand, this Court in *Corbitt* noted that its decision was limited to the facts of the particular New Jersey statute as the Court said: "We hold only that a state may make due allowance for pleas in its sentencing decisions and that New Jersey has not exceeded its powers in this respect ...". *Corbitt v. New Jersey*, 439 U.S. at 225, n. 15. The question of where the line is to be drawn was raised by Mr. Justice Stewart in his concurring opinion in *Corbitt* when he asked whether the state legislature could provide that the penalty for the defendant who pleads guilty is one-half the penalty of the defendant convicted after a trial. This question is very important today in light of federal and state sentencing guidelines which reward defendants who plead guilty and cooperate with the prosecution. This Court needs

to answer the question of how far legislatures can go in encouraging guilty pleas and chilling the exercise of constitutional rights.

There is a split among the three cases from other jurisdictions involving constitutional challenges to refusal statutes on the basis of *Jackson*. In two of these cases, the Court found that the refusal statute needlessly encouraged a guilty plea on the underlying charge of driving while intoxicated, and in both cases the Court declared the statute unconstitutional. See, *Veilleux v. Springer*, and *Voyles v. Thorneycroft*. In the third case, *Haas v. State, Bureau of Motor Vehicles*, the Court of Appeals of Ohio held that the legislative purpose behind the refusal statute made it distinguishable from *United States v. Jackson*.

In both *Veilleux v. Springer* and *Voyles v. Thorneycroft*, the courts applied the holding of *Jackson* even though the death penalty was not involved and the refusal statute represented a separate civil and administrative proceeding. These cases further illustrate the vitality of *Jackson* at all levels, because what is at stake is the exercise of one's constitutional rights. The right not to plead guilty is not conditioned or qualified by the constitution, and that right is just as important to our system of criminal justice when applied to a DWI charge as it is when applied to a capital offense.

CONCLUSION

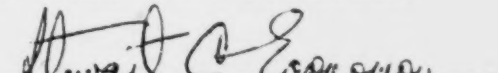
For the reasons stated herein, this Court should summarily reverse the decision of the Virginia Supreme Court denying standing to the petitioner and remand the case to the Virginia Supreme Court for a decision on the merits.

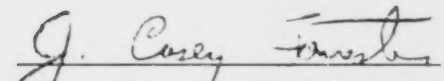
In the alternative, this Court should issue a writ of certiorari to review the judgment of the Supreme Court of Virginia.

Respectfully submitted,

ANDREW G. LEONARD,
By Counsel

ECONOMOU AND FORRESTER

By: 
Stewart C. Economou, Esquire,
Counsel for Petitioner

By: 
J. Casey Forrester, Esquire,
Co-Counsel for Petitioner

August 7, 1989

APPENDIX

CONSTITUTIONAL PROVISIONS, STATUTES, AND ORDINANCES

United States Constitution, Fifth Amendment:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or an indictment of a grand jury, except in cases arising in the land or naval forces, or in the militia, when in actual service in time of war or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty or property, without due process of law; nor shall private property be taken for public use, without just compensation.

Statute in Question
(As designated prior to 1988 amendments.)

§18.2-268. Use of chemical test to determine alcoholic content of blood; procedure; qualifications and liability of person withdrawing blood; costs; evidence; suspension of license for refusal to submit to test; localities authorized to adopt parallel provisions.

* * *

(i) When the court receives the declaration of refusal or the certificate referred to in subsection (k) together with the warrant charging the defendant with refusing to submit to having a sample of his blood or breath taken for the determination of the alcoholic content of his blood, the court shall fix a date for the trial of the warrant, at such time as the court shall designate, but subsequent to the defendant's criminal trial for driving under the influence of intoxicants. Upon request, the defendant shall be granted a trial by jury on appeal to the circuit court.

* * *

(n) If the court or jury finds the defendant guilty as charged in the warrant, the court shall suspend the defendant's license for a period of six months for a first offense and for one year for a

second or subsequent offense or refusal within one year of the first or other such refusals. The time shall be computed as follows: the date of the first offense and the date of the second or subsequent offense. *However, if the defendant pleads guilty to a violation of §18.2-266, or of a similar ordinance of a county, city or town, the court may dismiss the warrant.* (Emphasis supplied.)

Ordinances of the Town of Herndon

Sec. 13.3 Adoption of state law.

(a) Pursuant to the provisions of §46.1-188 of the *Code of Virginia* (1950), *as amended*, all of the provisions and requirements of the laws of the Commonwealth of Virginia relating to the regulation of the operation of vehicles on the highways of the Commonwealth contained in Title 46.1 and in Article 2 (§18.2-266 *et seq.*) of Chapter 7 of Title 18.2 of the *Code of Virginia* (1950), as amended, and as in force and effect on July 1, 1986, including all procedural, substantive, and penalty provisions therein relating to the operation of vehicles on the highways of this State, except those provisions and requirements the violation of which constitutes a felony, and except those provisions and requirements which, by their very nature, can have no application to or within the Town, are hereby adopted and incorporated in this chapter by reference and are made a part of this chapter as fully as if set forth herein, and are hereby made applicable within the Town.

(b) It shall be unlawful for any person within the Town to violate or fail, neglect or refuse to comply with the provisions of Title 46.1 and of Article 2, Chapter 7, Title 18.2 of the *Code of Virginia* (1950), *as amended*, which are adopted by this section.

(c) The penalty for the violation of any provision or requirement hereby adopted shall be that penalty imposed for like offenses under Title 46.1 and Article 2, Chapter 7, Title 18.2 of the *Code of Virginia*, (1950), *as amended*.

VIRGINIA:

In the Supreme Court of Virginia held at the Supreme Court Building in the City of Richmond on Friday *the* 9th *day of* June, 1989.

Andrew Gordon Leonard, Appellant,

against Record No. 881165
Court of Appeals No. 1439-87-4

Town of Herndon, Appellee.

Upon an appeal from an order entered by the Court of Appeals of Virginia on the 29th day of September, 1988.

Upon consideration of the record, the briefs, and the arguments of counsel, the Court is of opinion that the appellant lacks standing to attack the facial constitutionality of Va. Code §18.2-268 (T) (formerly §18.2-268(n)), which has been incorporated into the ordinances of the Town of Herndon pursuant to the authority of Va. Code § 46.1-188. Accordingly, the Court affirms the action of the Court of Appeals of Virginia in denying the appellant's petition for appeal. The appellant shall pay to the appellee thirty dollars in damages.

This order shall be certified to the Court of Appeals of Virginia and to the Circuit Court of Fairfax County.

A copy,
Teste:

_____
Clerk

Virginia

In the Court of Appeals of Virginia on Thursday *the* 29th *day of* September, 1988.

Andrew Gordon Leonard, Appellant,

against Record No. 1439-87-4
Circuit Court No. 52506

Town of Herndon, Appellee.

From the Circuit Court of Fairfax County

Before Chief Judge Koontz, Judges Duff and Hodges

This petition for appeal is denied for the following reason: The panel concluded that Code §18.268(n) does not encourage guilty pleas to the underlying charge of driving while intoxicated so as to violate a defendant's constitutional right to plead not guilty. *Corbitt v. New Jersey*, 439 U.S. 212. The case of *United States v. Jackson*, 390 U.S. 570 is distinguishable in that the Virginia statute provides, in effect, that the decision to dismiss a refusal warrant rests within the sound discretion of the trial judge based upon the circumstances of the case.

A Copy,

Teste:
David B. Beach, Clerk
By:
Deputy Clerk

Nineteenth Judicial Circuit Of Virginia
Fairfax County Judicial Center
4110 Chain Bridge Road
Fairfax, Virginia 22030

November 4, 1987

Stewart C. Economou, Esq.
122 South Royal Street
Post Office Box 19467
Alexandria, Virginia 22320-0467

Bruce M. Blanchard, Esq.
Assistant Town Attorney
Post Office Box 367
10505 Judicial Drive, Suite 300
Fairfax, Virginia 22030

Re: *Commonwealth v. Andrew Gordon Leonard*
Criminal No. 52506

Dear Counsel:

This matter comes before the Court on Defendant's Motion to Dismiss the Charge against him for refusal to submit to a blood or breath test pursuant to Va. Code § 18.2-268.

Defendant challenges the constitutionality of Va. Code §18.2-268(n) on the ground that the "disparate treatment of those who plead guilty to DWI as opposed to those who plead not guilty exacts a price and imposes a burden on defendant's right to go to trial." The Court disagrees.

Whether Va. Code §18.2-268(n) violates a defendant's fifth amendment right not to plead guilty depends on whether the statute "needlessly" or "unnecessarily" encourages guilty pleas. *Corbitt v. New Jersey*, 439 U.S. 212 (1978). In *Corbitt*, the Supreme Court noted "Specifically, there is no per se rule against encouraging guilty pleas. We have squarely held that a State *may* encourage a guilty plea by offering substantial benefits in return for the plea." *Id.* at 218-219 (emphasis added). The Virginia statute does exactly that –"if the defendant shall plead guilty to . . . [DWI], the court *may* dismiss the [refusal] warrant." Va. Code §18.2-268(n) (em-

phasis added). Since the decision to dismiss the refusal charge remains solely within the discretion of the trial judge, the statute does not "needlessly" or "unnecessarily" coerce any plea.

Moreover, while this statute may invite a plea of guilty to DWI, the Commonwealth has demonstrated legitimate purposes and goals so as to render any such encouragement neither "needless" or "unnecessary." The Commonwealth has achieved a balance between an individuals right of privacy in refusing to take a chemical test with the interests of the Commonwealth in protecting its citizens from the effects of intoxicated drivers.

The Ohio Court of Appeals, ruling on this issue, noted that the "purpose of the administrative suspension [of the driver's license] is not to punish the licensee but to protect the public, and the purpose of [the Refusal statute] is not to coerce guilty pleas but to encourage the fulfillment of the license's obligation to take the test." *Hass v. State of Ohio, Bureau of Motor Vehicles*, 7 Ohio Appl. 3d 139, 454 N.E.2d 974 (1982).

The Defendant relies primarily on *U.S. v. Jackson*, 390 U.S. 570 (1968), which held that Congress could not impose a penalty on those who plead not guilty and demand a jury trial in a manner that needlessly penalized their assertion of a constitutional right. However, *Jackson* has been distinguished and limited by subsequent Court decisions. In *Brady v. U.S.*, 397 U.S. 742 (1970), the Court explained that "[Jackson] neither fashioned a new standard for judging the validity of guilty pleas nor mandated a new application of the test theretofore fashioned by Courts and since reiterated that guilty pleas are valid if both 'voluntary' and 'intelligent.' " The Supreme Court again explained *Jackson* in *Chaffin v. Stynchcombe*, 412 U.S. 17 (1973), "*Jackson* did not hold, as subsequent decisions have made clear, that the Constitution forbids every government-imposed choice in the criminal process that has the effect of discouraging the exercise of Constitutional rights." The Court's latest pronouncement on this subject came in *Corbitt v. New Jersey, supra,* which upheld a New Jersey statutory scheme whereby a life sentence was mandatory upon a jury conviction for first-degree murder but a lesser sentence was permissible upon the acceptance of a plea of non vult or nolo contendere.

The Court determined that the statutory scheme did not exert such a powerful influence to coerce inaccurate pleas that it should be deemed constitutionally suspect. Therefore, the Jackson case is not controlling because of its subsequent limitation in *Brady, Chaffin,* and *Corbitt.*

For the reasons stated above, Defendant's Motion to Dismiss based on the Constitutionality of §18.2-268(n) is hereby denied. Further, Defendant is guilty of violating the Virginia Refusal statute, §18.2-268, based upon evidence presented at trial on September 17, 1987, and his privilege to drive is hereby revoked for six months.

Very truly yours,

/S/

Johanna L. Fitzpatrick

JLF/llr